



## STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	04/08/08	Bill No:	<a href="#">AB 2744</a>
Tax:	Local Fuel Fee	Author:	Huffman, et al
Related Bills:			

*This analysis only addresses the provisions that impact the Board.*

### BILL SUMMARY

This bill would allow the nine Bay Area counties to impose a local fee on motor vehicle fuel to fund greenhouse gas mitigation programs. This bill also repeals existing authority for the same nine counties to impose a local motor vehicle fuel tax to fund transportation projects.

### ANALYSIS

#### CURRENT LAW

Under the **Motor Vehicle Fuel Tax Law** (Part 2 of Division 2 of the Revenue and Taxation Code, Chapter 12 (commencing with Section 8500)) the Metropolitan Transportation Commission (Commission) has the authority to levy a local tax on motor vehicle fuel to fund transportation projects. The Commission is made up of nine Bay Area members that include the City and County of San Francisco, and the counties of Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma.

Under this same law (commencing with Section 7301), the state imposes an excise tax of \$0.18 per gallon on the removal of gasoline at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person.

Under the **Diesel Fuel Tax Law** (Part 31 of Division 2 of the Revenue and Taxation Code, commencing with Section 60001), the state imposes an excise tax of \$0.18 per gallon on the removal of diesel fuel at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person.

Under the **Use Fuel Tax Law** (Part 3 of Division 2 of the Revenue and Taxation Code, commencing with Section 8601), the state imposes an excise tax of \$0.18 per gallon for use of fuels. For liquefied petroleum gas (LPG), liquid natural gas (LNG), compressed natural gas (CNG), ethanol, and methanol, which are types of use fuels, the excise tax rates are \$0.06, \$0.06, \$0.07, \$0.09, and \$0.09, respectively. In lieu of the specified tax rates, an annual flat rate fuel tax may be paid by the owner or operator of vehicles powered by LPG, LNG, or CNG. The flat rate is based on the vehicles weight.

Additionally, Parts 1, 1.5, and 1.6 of Division 2 of the Revenue and Taxation Code impose state, local, and transactions **sales and use taxes** on all tangible personal property, including gasoline, sold at retail. The rates in the different cities and counties throughout the state range from 7.25% to 8.75% depending upon the jurisdiction in which the tangible personal property is purchased.

Lastly, the **Local Motor Vehicle Fuel Tax Law**, as contained in Part 4 (commencing with Section 9501) of Division 2 of the Revenue and Taxation Code, authorizes counties to impose countywide excise taxes on motor vehicle fuel at increments of one cent per gallon provided a majority of the voters approve the proposition. The funds collected must be used only for purposes authorized by Article XIX of the California Constitution,

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such as transportation planning and construction. To date, however, no county imposes a local fuel tax under this authority.

### PROPOSED LAW

This bill would add Section 66538 to the Government Code to allow members of the Commission to impose a fee on motor vehicle fuel, including gasoline or any other combustible liquid used to propel motor vehicles, at a rate established by the Commission, but not to exceed ten cents (\$0.10) per gallon.

If approved by the voters of the nine county region, as specified, the Commission may impose a greenhouse mitigation fee on each gallon of motor vehicle fuel that is delivered into the fuel supply tank or tanks of a motor vehicle in the region.

The Commission would be required to contract with the Board for the administration of the fee and the Board would be reimbursed for the actual costs to administer the fee based upon the results of an independent audit.

This bill would become effective January 1, 2009, but the operative date of the fee would be on January 1 of the year following the election approving the fee. Once commenced, the fee may not be imposed longer than 25 years.

This bill also repeals Chapter 12 (commencing with Section 8500) of Part 2 of Division 2 of the Revenue and Taxation Code, the provisions that currently authorize the Commission to impose a local gasoline tax.

### BACKGROUND

Assembly Bill 595 (Ch. 878, 1997) authorized the Commission to place before the voters in the nine county region a local excise tax on motor vehicle fuel to fund specified transportation projects.

### COMMENTS

1. **Sponsor and Purpose.** This bill is sponsored by the Transportation and Land Use Coalition and is intended to provide a dedicated source of funds to reduce climate emissions from transportation sources.
2. **The fee would be imposed on “motor vehicle fuel” as defined.** The bill primarily defines motor vehicle fuel as “gasoline or any other combustible liquid, regardless of the name by which the liquid is known or sold.” The current statute that authorizes the Commission to impose a tax on motor vehicle fuel also limits the tax to “motor vehicle fuel, as defined by Section 7326” – except that motor vehicle fuel used to power aircraft was exempt. For purposes of the Motor Vehicle Fuel Tax Law, the current definition of motor vehicle fuel is in Section 7326 and is defined to mean “gasoline and aviation gasoline. It does not include jet fuel, diesel fuel, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, alcohol, or racing fuel.”

The proposed definition of “motor vehicle fuel” is overly broad and is not consistent with the definition of motor vehicle fuel in Section 7326. If the definition of “motor vehicle fuel” is not revised in this bill, then those fuels currently excluded in Section 7326 may be subject to the fee. Additionally, the proposed definition of motor vehicle fuel may need to specifically exclude aviation gasoline from the fee.

Both the author's and the sponsor's fact sheets for this bill indicate that only gasoline would be subject to the fee. If the author intends to impose the local fuel fee only on motor vehicle gasoline, then the definition of "motor vehicle fuel" needs to be amended.

3. **The Board has the following administrative concerns.** There are many technical concerns with this bill, including the following:

- **This bill does not specify the level of imposition of the fee.** The current language allows the possibility of imposing a per-gallon fee at any level at which motor vehicle fuel, including gasoline, is sold within the region. This presents the possibility that the fuel could be assessed at the refinery, supplier, or retail sales level. Given that the fee would be imposed on the motor vehicle fuel at the time it is delivered into the fuel tank of a motor vehicle in the region, and that a "motor vehicle" is defined as those vehicles "operated or suitable for operation on a public street or highway," then the fuel delivered into something other than a motor vehicle fuel tank would not be subject to the fee.
- **What is exempt from the fee?** Is it the author's intent that motor vehicle fuel used to supply off-road vehicles, generators, recreational watercraft, lawnmowers, etc., would be exempt from the fee? If so, then the incidence of where the fee falls will dictate the method for claiming a deduction or claiming a refund. In general, the further up the supply chain the fee is imposed the fewer the deductions or exemptions. Each level of the supply chain would have their own concerns regarding the following: claims for exemptions; claims for refund; claims for tax-paid refunds as a deduction; bulk delivery sales outside the region; sales to the U.S. government; and increased complexity and documentation of fuel reporting.
- **When would the fee go into effect?** This is a non-urgency bill and if passed would go into effect January 1, 2009, but the operative date of the fee would be on January 1 of the year following the election approving the fee. The bill specifies that the regional board of supervisors would submit a measure to the voters at a local election consolidated with a statewide primary or general election. If the voters in the nine Bay Area counties approved a measure to impose a fee on a November General Election day, then, subject to a contract between the Commission and the Board, the fee could be imposed beginning on the following January. Does eight weeks provide sufficient time for the Board, retailers, fuel industry suppliers, and other affected parties to be prepared? It may be necessary to stipulate a longer lead time from the date the Commission imposes the fee, or provide a delayed operative date following the General Election approving the fee.
- **Due dates and reimbursements.** The bill should also be amended to specify a due date for the fee and return, authorize the payment of refunds on overpayments of the fee, and specify that the Board may deduct its costs of administration prior to transmitting the net revenue to the Commission.
- **The bill needs administrative and collection provisions.** This bill requires an amendment to specify that the Board is authorized to collect the local fuel fee pursuant to the Fee Collection Procedures Law. The Fee Collection Procedures Law contains "generic" administrative provisions for the administration and

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collection of fee programs to be administered by the Board. It was added to the Revenue and Taxation Code to allow bills establishing a new fee to reference this law, thereby only requiring a minimal number of sections within the bill to provide the necessary administrative provisions.

Among other things, the Fee Collection Procedures Law includes collection, reporting, refund, and appeals provisions, as well as providing the Board the authority to adopt regulations relating to the administration and enforcement of the Fee Collection Procedures Law. To provide consistency with other Board-administered fees, it is suggested that proposed Section 66538 be amended to provide the following:

The State Board of Equalization shall administer and collect the fee imposed pursuant to this section under the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). The State Board of Equalization may adopt regulations to carry out this section, including, but not limited to, provisions governing collections, reporting, refunds, and appeals.

- **Board staff has additional administrative concerns in collecting a local fee for a special district on a commodity already subject to an excise tax.** In addition to collecting excise taxes on motor vehicle fuels, the Board also collects excise taxes that are generally imposed on alcoholic beverages, cigarettes and tobacco products, natural gas, electrical energy, and certain telephone communication services.

To the general public it would appear the Board would have the resources, expertise, and ability to seamlessly implement a fee on already taxed commodities. However, as discussed in this analysis, there's a lot to consider with these types of proposed fees. In addition to those previously mentioned, the Board may have additional comments including, but not limited to, the following issues: co-administration of a fee program with a special district; unconstitutional or invalid fees and the refund of such fees; contract specifications; sales tax computation; prepayment of retail sales tax on fuels; possible separation of certain administrative functions (e.g. appeals/refunds); reimbursement of expenses; and technical definitions.

4. **A substantial fee increase could increase methods to evade the fee.** Current law requires the prepayment of approximately 80% of the sales tax that would be collected on the retail sales of fuels. Retailers are thereby required to report their sales of gasoline and diesel fuel in order to recoup those prepaid taxes. The prepayment statute was added in 1986 to curb the increasing incidences of sales tax evasion on gasoline sales.

Since the current excise tax on gasoline is generally collected at the refineries terminal rack, the tax is built into the fuel's retail purchase price. This process has curbed evasion of the excise tax at the retail sales level. This proposed fee, of up to ten cents (\$0.10) per gallon, combined with the possible imposition of the fee at the retail level, may provide sufficient incentive or opportunity for evasion of the fee.

5. **Legal challenges of any new fee program might be made on the grounds that the fee is a tax.** In July 1997, the California Supreme Court held in *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866 that the Childhood Lead Poisoning Prevention Act of 1991 imposed bona fide regulatory fees and not taxes requiring a two-thirds vote of the Legislature under Proposition 13. In summary, the Court found that while the Act did not directly regulate by conferring a specific benefit on, or granting a privilege to, those who pay the fee, it nevertheless imposed regulatory fees under the police power by requiring manufacturers and others whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating those products' adverse health effects.

Although this measure has been keyed by the Legislative Counsel as a majority vote bill, opponents of this measure might question whether the fee imposed is in effect a "tax" required to be enacted by a two-thirds vote of the Legislature.

## **COST ESTIMATE**

The Board would incur non-absorbable costs to adequately develop and administer a new fee program. These costs would be directly affected by the definition of motor vehicle fuels, thus affecting the type of fuels the fee would be assessed on (e.g. gasoline, diesel fuel, use fuels). Costs would also be substantially dependent on the level of the imposition of the fee. Generally, the higher up the supply chain the fee is imposed the more closely it would mirror current collections of gasoline and diesel excise taxes – meaning fewer registrants in the new fee program. The lower the fee is imposed the more it becomes similar to the Board's collection of sales taxes – larger number of fuel retailers and purchasers. Costs could be related to registering fuel retailers, developing related computer programs, processing returns, payments, claims for refunds, exemption forms, and carrying out compliance and audit efforts to ensure proper reporting, along with developing regulations, training staff, and answering inquiries from the public. A cost estimate of this workload is pending.

## **REVENUE ESTIMATE**

### **BACKGROUND, METHODOLOGY, AND ASSUMPTIONS**

This proposal would authorize the Commission to impose a fee on motor vehicle fuel, including gasoline or any other combustible liquid used to propel motor vehicles, at a rate established by the Commission, but not to exceed ten cents (\$0.10) per gallon. Prior to imposing a regional fee a measure would have to be approved by the voters within the nine county region at an election. The Commission includes the counties of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano and Sonoma.

According to estimates prepared by the California Department of Transportation, taxable gasoline use in these 9 counties in 2006 amounted to 3.2 billion gallons.

### REVENUE SUMMARY

Given that this proposal does not specify the amount of the fee and only indicates a maximum fee of \$0.10 per gallon, the following depicts revenue estimate at three fee levels:

- A fee rate of 2.5 cent per gallon on the gasoline purchased in the 9 county Commission region would raise \$80 million (3.2 billion gallons × \$0.025 = \$80 million).
- A fee rate of 5 cent per gallon on the gasoline purchased in the 9 county Commission region would raise \$160 million (3.2 billion gallons × \$0.05 = \$160 million).
- A fee rate of 10 cent per gallon on the gasoline purchased in the 9 county Commission region would raise \$320 million (3.2 billion gallons × \$0.10 = \$320 million).

### Qualifying Remarks

This bill defines motor vehicle fuel as “gasoline or any other combustible liquid, regardless of the name by which the liquid is known or sold”. We do not have any information on consumption of ‘other combustible liquid’ at the county level. This revenue estimate is understated and would be higher if ‘other combustible liquid’ were known and included in this estimate.

Analysis prepared by:	John Cortez	916-445-6662	04/22/08
Revenue estimate by	Ronil Dwarka	916-445-0840	
Contact:	Margaret S. Shedd	916-322-2376	
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